IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1456

PAMELA PECK,

Petitioner,

vs.

WILLIAM DUNN, PETE KUTULAS, and WILLIAM HUTCHINSON, as members of the Board of County Commissioners of Salt Lake County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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The PETITIONER, PAMELA PECK, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah entered in this proceeding on January 13, 1978.

OPINION BELOW

The opinion of the Utah Court in *Peck v. Dunn*, 574 P.2d 367 (Utah 1978) appears as Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on January 13, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I.

WHETHER A SALT LAKE COUNTY, STATE OF UTAH ORDINANCE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DEFINING THE OFFENSE OF CRUELTY TO ANIMALS IN AN IMPERMISSABLY VAGUE, OVERBROAD AND UNCERTAIN MANNER.

STATUTORY PROVISIONS INVOLVED

Revised Ordinances of Salt Lake County, Title 16, Chapter 3, Section 28(h):

> "Any person, firm, or corporation who shall raise, help or use any animal, fowl, or bird for the purpose of fighting or baiting; and any person who shall be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl; and any person, firm or corporation who shall rent any building, shed, room, yard, ground, or premises for any such purposes as aforesaid, or shall knowingly suffer or permit the use of his buildings, sheds, rooms, yards, grounds, or premises for the purposes aforesaid; and any person, firm or corporation who shall knowingly carry, haul, or deliver any animal, fowl, or bird to be used for any of the purposes aforesaid, shall be guilty of a Class "B" Misdemeanor, and shall be subject to a fine in an amount not to exceed $299.00 or imprisoned in the County Jail not to exceed six months or both."

STATEMENT OF THE CASE

Petitioner was charged with having violated the aforementioned ordinance on January 8, 1977, more specifically she was charged as being ". . . a party to or present at such fighting or baiting of a fowl. . ."

In order to arrest her prosecution, petitioner sought a declaratory judgment that the portion of the ordinance under which she was charged was vague, and uncertain in that innocent conduct could be included within its language, and therefore, it was repugnant to the Due Process Clause of the U. S. Constitution and Article I Section 7 of the State Constitution. Petitioner also challenged the ordinance on the ground that it did not require a culpable mental state.

Respondent's Motion to Dismiss petitioner's complaint was granted by the trial court. The Utah Supreme Court affirmed the trial court action, ruling that the ordinance required a person in order to be convicted, to purposefully and intentionally attend and observe a fight and, thus construed, was constitutional.

REASONS FOR GRANTING WRIT

A DETERMINATION BY THIS COURT THAT THE ORDINANCE VIOLATES THE DUE PROCESS CLAUSE WOULD PREVENT THE STATE FROM PUNISHING INNOCENT CONDUCT AND RESOLVE A CONFLICT BETWEEN TWO STATE SUPREME COURTS OVER WHETHER A STATE MAY PROSCRIBE PRESENCE AT THE SCENE OF ADMITTEDLY CULPABLE ACTIVITY CONSISTENT WITH THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW.

Your petitioner does not challenge the power of a state or its political subdivisions to enact prohibiting cruelty to animals and to define such cruelty to include cock fighting. It is her contention that an ordinance which punishes on who ". . . is a party to or present as a spectator at such fighting . . ." is vague and overbroad and

thus violative of Due Process. The ordinance is capable of being applied to one who has committed no criminal act or has no intent to commit such an act, but who, like petitioner, simply has the misfortune to be in the vicinity of some other person's criminal act. The Utah State Supreme Court has construed the ordinance to require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight, (see Appendix A, page 3), but such a construction is not enough to save the ordinance from the fatal vagueness defined by this Court in past decisions and found by other state and federal courts in cases similar to that of petitioner.

The tests for vagueness violative of Due Process in a criminal statute are not new. In *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926), it was said "that the terms of a penal statute creating a new offense must be explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates the first essential of due process of law." The standard was elaborated on in *Lanzette v. New Jersey*, 306 U.S. 451, 453 (1939), . . . "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." The final guidelines used when a statute has been challenged as vague were summarized in *Papachristou v. City of Jacksonville*, 406 U. S. 156 (1972), which held that City's vagrancy ordinance void

for vagueness. . . "both in the sense it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, *U. S. v. Harriss*, 347 U. S. 612, 617 . . . [and because] it encourages arbitrary and erratic arrests and convictions, *Thornhill v. Alabama*, 310 U. S. 88, 98. . . Where, as here, there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' *Thornhill v. Alabama*, 310 U. S. 88, 98," *Papachristou*, at 165 and 170. "A vague law impermissably delegates basic policy matters to policemen, judges and juries for resolution of an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application," *Grayned v. City of Rockford*, 408 U. S. 104, 108-109 (1974).

Two examples of statutes this Court has declared vague appear in *Winters v. New York*, 333 U. S. 507, (1948) and *Wright v. Georgia*, 373 U. S. 284 (1963). In *Winters*, a New York law prohibited distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. The Court in holding it unconstitutional stated, ". . . fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required — no indecency or obscenity in any sense heretofore known to the law. . . No conspiracy to commit a crime is required. . . It is not any effective notice of new crime. . ."

Winters, at 519. In *Wright,* six blacks were convicted of a Georgia breach of the peace statute. The defendants' only conduct was to play basketball in a 50 acre park where the possibility existed that some persons other than the defendants apparently intended to cause some sort of trouble. (at 292, 293). This Court concluded, "... this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissable and constitutionally impermissable applications of the statute..." *Wright,* at 292, 293.

The essential element of all of the aforementioned cases in which statutes were found unconstitutionally vague would seem to be that the statutes were applied to persons engaged in essentially innocent conduct who had no notice that their conduct was forbidden. In two cases decided by other courts, the essentially innocent conduct which statutes sought to punish was presence in some place, much the same conduct for which statutes sought to punish was presence in some place, much the same conduct for which your petitioner may be punished. In *Karp v. Collins,* 310 F. Supp. 627 (D.N.J. 1970) vacated as *Kugler v. Karp,* 401 U.S. 930, on remand at 333 F. Supp. 15, a provision of a new Jersey statute provided, "Any person who is apprehended and cannot give a good account of himself, or who is engaged in an illegal occupation and *who is in this state for an unlawful purpose is a disorderly person,*" *Karp* at 629 [Emphasis added]. The Court went on to hold the law unconstitutionally vague and enjoin its enforcement but this Court vacated the injunction, not apparently, because the reasoning of the lower court was improper but because the granting of an injunction was premature. The lower court found

that the New Jersey Supreme Court had construed the statute to prohibit the act of going to a place and remaining there with an intent to commit a crime or petty offense. "In this light, we find that even under the most limited construction, the statute is invalid because of the vagueness of the "place" to which a defendant must go with an unlawful purpose. . . This could be as broad as the boundaries of the state of New Jersey or of any city or political subdivision in the state to which a person may go . . . It is not clear at what point in time or place the criminal offense comes . . . the statute makes no attempt to limit "place" to a specific or identifiable location or an area which could be deemed its curtilage . . . the effort . . . affects . . . not merely freedom of thought but also freedom of movement . . [and is] too vague and fails to define with constitutional definiteness when one crosses the boundary between thought and criminal conduct," *Karp* at 632, 633, 634. This reasoning is equally applicable to the Salt Lake County ordinance your petitioner has challenged. The ordinance proscribes presence at a cockfight but fails to define in spatial terms just exactly what presence is to be punished. Despite the Utah Supreme Court's construction of the statute as requiring "intentional" presence, without some sort of spatial definition of presence the statute is vague and unenforceable. The Hawaii Supreme Court has reached this conclusion on the same issue.

State v. Abellano, 50 Haw. 384, 441 P.2d 333 (1968) considered a county ordinance which provided, "It shall be unlawful for any person to engage or participate in or be present at, any cockfighting exhibition," *Abellano* at 334. On the authority of *Connally v. General Const. Co.,* 269 U. S. 385 (1926) the Court held the ordinance which is essentially identical to the Salt Lake County ordinance, unconstitutionally vague and therefore, viola-

tive of due process. That Court's reasoning in reaching its conclusion is equally applicable to the present case, "In determining whether the standard of being 'present at' a cockfight is unconstitutionally vague, we are met at the outset with this court's ruling in *Territory of Hawaii v. Wong,* 40 Haw. 257 (1953). There the Court sustained against the claim of unconstitutional vagueness a statute which made it unlawful to be "present" where a gambling game was being played. The Court construed the word present to mean intentional presence with knowledge that a gambling game was going on. . . While recognizing that the applicability of the statute remained dubious in many situations, it concluded that the statute as construed was not constitutionally defective for vagueness. . . . We overrule Territory of *Hawaii v. Wong.* The Court went too far in attempting to sustain the statute. . . An ordinance or statute proscribing presence, whether at a cockfight, a gambling game, or a house of prostitution, is too vague to satisfy the requirements of due process. Primarily, the term presence has a spacio-physical frame of reference. Unless the activity at which presence is unlawful is in a narrowly confined place determination of what constitutes presence at that activity can be resolved only on the basis of policy. . . The legislative body has failed to make clear its policy determination. For this court to attempt to rewrite the ordinance to cure the constitutional defect would be an unconstitutional exercise of legislative power." *Abellano* at 334-335. Thus, the Hawaiian Court, faced with the same ordinance as the State of Utah, and presented with the same federal question of due process and void for vagueness, came to a different conclusion than the State of Utah. This Court should issue a Writ of Certiorari if for no other reason than to resolve the conflict in the two states' opinions of the meaning of federal due process.

In *Scales v. United States,* 366 U. S. 978 (1961), a case considering the alleged vagueness of the Smith Act in light of Fifth Amendment Due Process, this Court set forth the general principle that, "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or conduct can only be justified by reference on the relationship of that status or conduct to other concedely criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment," *Scales* at 224, 225. The reasoning in Scales should apply equally to the States through the Fourteenth Amendment.

The question your petitioner seeks to have resolved is whether the "Status or conduct" of being present "as a spectator in the sense of one purposefully and intentionally attending and observing such a cockfight. . ." (Appendix A, page 3) is sufficiently related to the concedely criminal activity of putting on a cockfight to survive a Due Process attack, or whether the prohibition against being "present" is so vague as to be unconstitutional. Considering *State v. Abellano,* 50 Haw. 384, 441 P.2d 333 (1968), petitioner contends that the Salt Lake County ordinance, Title 16 Chapter 3, Section 28(h) is unconstitutionally vague. The ordinance without a spatial definition of the term "present" could be used to prosecute innocent passersby who "intentionally attended and observed" a cockfight by watching one across a field, through a hole in a fence, through a barn door, through a window, on television, or in a motion picture. The Utah Court contended this could not happen on page 2 of Appendix A, "Perhaps we should appreciate her concern for an innocent person caught in such a predicament. Indeed we would, and we think that any reasoning law enforcement officer, prosecutor, judge or jury would, if

such were the facts." But this language does not save the ordinance from its fatal vagueness, indeed, this was the very sort of discretion condemned in *Grayned v. City of Rockford,* 408 U. S. 104 (1974). It is no consolation to those who are charged with crimes under vague laws that good-natured prosecutors, judges, juries and police officers might later vindicate their innocent conduct, the stigma and cost of a criminal charge and/or prosecution will remain. As this Court said in Grayned, "a vague law impermissably delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application," at 108-109. By granting this petition, the honorable Court can protect those innocent people who may find themselves caught in the net of this ordinance when Salt Lake County chooses to sweep-up the dozens of "spectators" who may choose to attend such an event.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Utah Supreme Court.

Respectfully submitted.

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Appendix

APPENDIX

FILED January 13, 1978
Geoffrey J. Butler, Clerk

IN THE SUPREME COURT OF THE
STATE OF UTAH

No. 15338

PAMELA PECK,
Plaintiff and Appellant,

vs.

WILLIAM DUNN, PETE KUTULAS, and
WILLIAM HUTCHINSON, as Members of the Board
of County Commissioners of Salt Lake County,
Defendants and Respondents.

CROCKETT, Justice:

Plaintiff, Pamela Peck, was charged with the offense of cruelty to animals, in violation of Title 16, Chapter 3, Section 28, Revised Ordinances of Salt Lake County, in that "at Peck Farm, at 8:50 p.m. on the 8th day of January, 1977 . . . [she did] keep or use an animal . . . to wit: a game cock, for the purpose of fighting . . . or [that she] was a party to or present as a spectator at such fighting. . . ."

In order to arrest that prosecution, she brought this action against the County Commission seeking a declaratory judgment that the ordinance is unconstitutional on the grounds: (1) that it is vague and uncertain in that innocent conduct of merely being a spectator could be included within its language; and (2) that presence at such a cock fight is proscribed, without requiring a culp-

able mental state. The trial court rejected her contentions and she appeals.

It is elementary that the governing authority[1] in the exercise of its police power has both the prerogative and the responsibility of enacting laws which will promote and conserve the good order, safety, health, morals and general welfare of society. The question is whether this ordinance is properly regarded as regulatory of morals. What constitutes morals is whatever conduct, customs and attitudes are generally accepted and approved at the time in the particular culture. It is therefore essential to consider whether cock fighting can be regarded as merely an innocent diversion, as plaintiffs' argument seems to suggest, or is itself an evil which may be condemned by law.

In former times the provoking and baiting of animals to fight each other for the amusement of spectators was a diversion to be accepted, or at least tolerated.[2] Indeed in yet earlier times the pitting of human beings against each other as gladiators, or against animals, was similarly viewed; and even today the fighting of animals is so accepted in some parts of the world. Over the centuries the disposition to look upon such brutalities with favor or approval has gradually lessened, and compassion and concern for man's fellow creatures of the earth has increased to the extent that it is now quite generally thought that the witnessing of animals fighting, injuring and perhaps killing one another is a cruel and barbarous practice, discordant to man's finer instincts and so offensive to his sensibilities that it is demeaning to morals.[3]

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[1]The County Commission, acting in its legislative function.

[2]*State v. Buford*, 65 N.M. 51, 331 P.2d 1110, 82 A.L.R. 2d 787 (1958); *State ex rel. Miller v. Claiborne*, Kan., 505 P.2d 732 (1973).

[3]See a good expression on this subject by Justice Steele, in *Bland v. People*, 32 Colo. 319, 76 P. 359 (1904). In commentary on such moral standards George B. Shaw writes: "When a man shoots a tiger to murder him, he calls it sport, but when a tiger attacks a man, he calls it a savage beast."

Whatever one's personal views may be of such matters, the legislative authority of our state has determined as a matter of public policy that such conduct is so involved in public morals and welfare that it has made cruelty to animals a crime and included therein the causing of one animal to fight with another.[4] There is no question but that a cock is an animal; and the county ordinance in question specifically so indicates by its express prohibition of the causing animals, including any fowl, to fight.[5] The county ordinance in question is in harmony with and does not extend the concept determined as the public policy of our state by statute referred to. In consequence of what we have said above, we are in agreement with the expression of respected authorities that legislation against such practices as the fighting of animals is justified for the purpose of regulating morals and promoting the good order and general welfare of society.[6]

Plaintiff's further argument is that under the literal wording of the ordinance, an innocent passing by onlooker could be found guilty. Perhaps we should appreciate her concern for an innocent person caught in such a predicament. Indeed we would; and we think that any reasoning law enforcement officer, prosecutor, judge or jury would, if such were the facts. But it does ont appear that they are the facts here. In regard to plaintiff's contention, these things are to be said generally about the interpretation and application of a statute or ordinance: it is not

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[4]U.C.A. 1953, Sec. 76-9-301: "(1) A person commits cruelty to animals if he . . . (f) Causes one animal to fight with another. . . ."

[5]See *Oregon Game Fowl Breeders Assn. v. Smith, Or.App.*, 516 P.2d 499 (1974), where the court held that cockfighting was prohibited by a statute proscribing cruelty to animals because the statute specifically included birds in the category of animals.

[6]That cruelty to animals was indictable at common law as a misdemeanor and is a proper subject for regulation by statute or ordinance, see 3A C.J.S., Animals Sec. 9. See also 16 C.J.S., Constiutional Law Sec. 174 and numerous cases therein cited.

our duty to indulge in conjecture that the statute may be so distorted or unreasonably applied that some innocent person might come within its terms. Rather, it is our duty to assume that those who administer a statute will do so with reason and common sense, in accordance with its language and intent; and further, that if there is a choice as to the matter of its interpretation and application, that should be done in a manner which will make it constitutional, as opposed to one which would make it invalid.

What has just been said also bears on plaintiff's other argument: that the ordinance denounces conduct without requiring a culpable mental state. We recognize, of course, that most crimes require a criminal intent in the doing of the act prohibited. Some require only a general intent to do an act, which is evil in itself. Examples are acts like murder, rape, kidnapping, which are said to be malum in se. In such circumstances, a person is presumed to intend the natural consequences of his act[7] and the general criminal intent with which an act was done may be inferred from the words and conduct of the actor.[8]

There are other crimes which require a specific intent. In them the prosecution must prove the intent with which the act was done.[9] For example, the elements of the crime of burglary are (1) the act of entering a building, and (2) the specific intent to commit a "felony, theft or assault" therein.[10] The entering of a building is not inherently evil, and that act alone does not give rise to a presumption or an inference that the actor entered with the requisite intent to constitute burglary. In addition to the entry, the intent to commit a "felony, theft or assault"

[7] *State v. Peterson*, 22 Utah 2d 377, 453 P.2d 696 (1969).
[8] 22 C.J.S., Criminal Law Sec. 33.
[9] 22 C.J.S., Criminal Law Sec. 32.
[10] U.C.A. 1953, Sec. 76-6-202.

therein must be proved, or circumstances shown from which the intent may reasonably be inferred.[11]

In addition to the classes of crimes just discussed, which require proof of intent, there is another class of crimes in which the doing of an act is prohibited by law and the doing of the act itself constitutes the crime, without regard to the intent with which it is done. They are spoken of as malum prohibitum, and are sometimes referred to as crimes of strict liability, or absolute responsibility. Examples of these are traffic regulations such as prohibiting driving through red lights, stop signs, or at excessive speeds, the carrying of loaded firearms in certain places and circumstances,[12] the carrying of concealed weapons,[13] or unauthorized possession of narcotics. With respect to this class of crimes, the only criminal intent necessary is implicit in the willful doing of the prohibited act.

Applying the principles above stated to the plaintiff's contentions, it will be seen that a sensible and practical application of the ordinance would require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight, as opposed to some mere passerby happening to so observe it. If the ordinance is thus looked at and applied in what we have stated to be a sensible and practical way, we see no justificaiton for declaring it unconstitutional.[14] This conclusion is reinforced by the doctrine of constitu-

[11] *State v. Clements*, 26 Utah 2d 298, 488 P.2d 1045 (1971); *State v. Jamison*, 110 Ariz. 245, 517 P.2d 1241 (1974).
[12] U.C.A. 1953, Sec. 76-10-505.
[13] U.C.A. 1953, Sec. 76-10-504.
[14] We decide as herein indicated in awareness of *State v. Abellano*, 50 Hawaii 384, 441 P.2d 333 (1969), relied upon by the plaintiff which decided that the statute which condemned merely being "present" at a cockfight was unconstitutional because it might encompass innocent conduct.

tional law that the courts should defer to the legislative prerogative and should presume such enactments to be valid and should not strike down legislation unless it clearly and persuasively appears that the act is in conflict with a constitutional provision.[15]

Affirmed. No costs awarded.

WE CONCUR:

A. H. Ellett, *Chief Justice*

Richard J. Maughan, *Justice*

D. Frank Wilkins, *Justice*

Gordon R. Hall, *Justice*

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[15]In the matter of the Estate of Baer, Utah, 562 P.2d 614 (1977); *Branch v. Salt Lake County Service Area No. 2*, 23 Utah 2d 181, 460 P.2d 814 (1969); *Gord v. Salt Lake City*, 20 Utah 2d 138, 434 P.2d 449; 16 C.J.S., Constitutional Law Sec. 99.